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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 PETER J. VOGGENTHALER, et al.,)

9 Plaintiffs,)

10 v.)

11 MARYLAND SQUARE, LLC, et al.,)

12 Defendants.)

13 _____)
14 MARYLAND SQUARE, LLC, et al.,)

15 Third Party Plaintiffs,)

16 v.)

17 GENERAL GROWTH MANAGEMENT, INC.,)
18 a foreign corporation, et al.)

19 Third Party Defendants.)
_____)

2:08-CV-1618-RCJ-GWF

ORDER

20 Currently before the Court is a Motion for Leave to File a Third Party Complaint (#249)
21 filed by Defendant Melvin Shapiro.

22 Also before the Court is a Motion for More Definite Statement (#292) filed by Third
23 Party Defendants Boulevard Mall, LLC and General Growth Management, Inc.

24 Also before the Court is a Motion to Dismiss Third Party Complaint (#310) filed by Third
25 Party Defendant Sears Roebuck & Co.

26 Finally, before the Court is a Motion to Consolidate (#335) filed by Defendants Melvin
27 Shapiro, Shapiro Bros. Investment Co., a dissolved Nevada corporation, and Melvin Shapiro
28 as Executor of the Estate of Philip Shapiro, deceased.

1 The Court heard oral argument on the foregoing motions on July 6, 2010.

2 DISCUSSION

3 I. Motion of Defendant Melvin Shapiro for Leave to File a Third-Party Complaint

4 Defendant Melvin Shapiro ("Defendant Shapiro") moves the Court pursuant to Federal
5 Rule of Civil Procedure 14(a)(1) to file a third-party complaint in this action. Defendant
6 Shapiro seeks to add third-party claims of indemnification, contribution and/or negligence
7 against many of the entities previously identified in the Maryland Square Defendants' Third
8 Party Complaint (#224) dated February 3, 2010.

9 Rule 14(a)(1) provides that a "defending party may, as third-party plaintiff, serve a
10 summons and complaint on a nonparty who is or may be liable to it for all or part of the claim
11 against it." The purpose of this rule "is to promote judicial efficiency by eliminating the
12 necessity for the defendant to bring a separate action against a third individual who may be
13 secondarily or derivatively liable to the defendant for all or part of the plaintiff's original claim."
14 Sw. Adm'r, Inc. v. Rozay's Transfer, 791 F.2d 769, 777 (9th Cir. 1986)(citing 6 C. Wright & A.
15 Miller, Federal Practice and Procedure § 1442, at 202-03 (1971)).

16 The Court grants Defendant Shapiro's request for leave to file a third-party complaint.
17 The proposed third-party complaint does not add a party not already part of this case and
18 does not assert new claims not currently pending before the Court. In addition, Defendant
19 Shapiro's motion is timely in light of the Court's previous Order (#238) extending the time
20 within which to add claims or parties to February 26, 2010. Finally, Shapiro's motion has not
21 been opposed by any party.

22 II. General Growth Management, Inc.'s and Boulevard Mall, LLC's Motion for More 23 Definite Statement

24 Third-Party Defendants General Growth Management, Inc. ("General Growth") and
25 Boulevard Mall, LLC ("BMLLC") have filed a Motion for More Definite Statement (#292) in
26 relation to Third Party Plaintiffs Maryland Square Shopping Center, LLC, The Herman Kishner
27 Trust dba Maryland Square Shopping Center, Irwin Kishner, Jerry Engel, Bank of America,
28 as trustee for The Herman Kishner Trust, Maryland Square, LLC, and the Clark County School

1 District's (collectively referred to herein as "Third Party Plaintiffs") Third Party Complaint.

2 According to General Growth and BMLLC, they are entitled to a more definite statement
3 because the allegations relating to them in the Third Party Complaint are so "ambiguous and
4 contradictory" that General Growth and BMLLC are "prevented from preparing an appropriate
5 response." (Motion for More Definite Statement (#292) at 3). In this regard, General Growth
6 and BMLLC state that they are identified in the Third Party Complaint, and referred to therein,
7 as "Boulevard Mall." However, throughout the Third Party Complaint, the Third Party Plaintiffs
8 also refer to the physical location known as the Boulevard Mall as the "Boulevard Mall." As
9 such, General Growth and BMLLC state that the Third Party Plaintiffs "have clearly failed to
10 differentiate between the business entities and the parcel of land at issue." Id. Because of
11 this, General Growth and BMLLC request that the Third Party Complaint "properly differentiate
12 between the business entities . . . and the real property known as, The Boulevard Mall." Id.
13 Moreover, if there is a relationship between the business entities and the physical location,
14 General Growth and BMLLC request that such relationship be alleged.

15 In response, the Third Party Plaintiffs allege that a more definite statement is
16 unnecessary because the allegations in the Third Party Complaint that General Growth and
17 BMLLC find ambiguous or unintelligible "can very easily be responded to in an Answer."
18 (Opposition to Motion for More Definite Statement (#305) at 3). The Third Party Plaintiffs
19 concede that in their complaint "the owners of the Boulevard Mall property - the Boulevard
20 Mall Defendants - were collectively referred to as Boulevard Mall," and that "[l]ater in the Third
21 Party Complaint, in the specific allegations against Boulevard Mall, the term 'Boulevard Mall'
22 was used interchangeably referring to the actual location of the mall and the Third Party
23 Defendant entities." Id. at 4. Despite this, the Third Party Plaintiffs argue that General Growth
24 and BMLLC's motion is based on a "manufactured ambiguity," designed solely to seek a delay
25 in responding to the allegations in the Third Party Complaint. As such, the Third Party
26 Plaintiffs assert that the motion should be denied and General Growth and BMLLC should be
27 ordered to immediately respond to the Third Party Complaint. Id. at 6.

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1 Federal Rule of Civil Procedure 12(e) states that a “party may move for a more definite
2 statement of a pleading to which a responsive pleading is allowed but which is so vague or
3 ambiguous that the party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). “The
4 motion must be made before filing a responsive pleading and must point out the defects
5 complained of and the details desired.” Id. “Rule 12(e) is designed to strike at unintelligibility,
6 rather than want of detail.” Woods v. Reno Commodities, Inc., 600 F.Supp. 574, 580 (D.C.
7 Nev. 1984)(citing 2A Moore’s Fed. Prac., ¶ 12.18 at p. 2389). “A motion for more definite
8 statement should not be granted to require evidentiary detail that may be the subject of
9 discovery.” Id.

10 The Court grants the motion for more definite statement. The allegations asserted in
11 the Third Party Complaint are ambiguous because the Third Party Plaintiffs identified both the
12 business entities and the physical location as the “Boulevard Mall.” Such identification
13 creates vague and ambiguous pleadings because General Growth and BMLLC are required
14 to guess as to which allegations relate to them as the business entities versus the physical
15 location of the mall. A more definite statement would clarify this ambiguity and allow General
16 Growth and BMLLC to respond to the allegations in a proper manner.

17 **III. Third Party Defendant Sears Roebuck & Company’s Motion to Dismiss**

18 Third Party Defendant Sears Roebuck & Company (“Sears”) has filed a motion to
19 dismiss the Third Party Complaint asserted against it by the Third Party Plaintiffs Maryland
20 Square, LLC; the Herman Kishner Trust, dba Maryland Square Shopping Center; Irwin
21 Kishner; Jerry Engel, and Bank of America, as Trustees for The Herman Kishner Trust;
22 Maryland Square, LLC; and Clark County School District (collectively referred to herein as the
23 “Maryland Square Defendants”).

24 According to Sears, the claims asserted against it must be dismissed because they fail
25 to state plausible claims for relief. (Motion to Dismiss (#310)). Sears states that the Third
26 Party Complaint “constitutes nothing more than speculation about what [Sears] *might* have
27 done to contribute to the claimed contamination.” Id. at 3. Specifically, Sears states that “the
28 sparse nature of the allegations contained in the [Third Party Complaint] reveals that while the

1 Maryland Square Defendants proclaimed they ‘believe’ the third party defendants are
2 responsible for the plume . . . a more accurate characterization of their state of mind is that
3 they wish the third party defendants were responsible.” Id. Sears states that the allegations
4 in the Third Party Complaint are insufficient because the Maryland Square Defendants have
5 not alleged that Sears “actually used any type of contaminants actually contained in the
6 Maryland Square plume, that Sears actually spilled, accidentally discharged, or released any
7 such contaminants, or that any such contaminants spilled, accidentally discharged, or
8 released found their way into the Maryland Square Plume.” Id. at 6.

9 In response, the Maryland Square Defendants allege that they have sufficiently
10 provided factual allegations concerning their claims against Sears and Sears’ potential liability
11 for contribution to the plume at issue in Plaintiffs’ Complaint. (Opposition to Motion to Dismiss
12 (#318) at 3). According to the Maryland Square Defendants, their claim against Sears is
13 straightforward: “Namely, Defendants, who have been alleged to be responsible for a
14 contaminant plume in the primary Complaint, allege that Sears, through releases of
15 contaminants during operations conducted at the neighboring Boulevard Mall, may have
16 contributed to this plume.” Id. Specifically, the Maryland Square Defendants state that “[u]pon
17 information and belief, the Maryland Square Defendants allege that Sears and the other
18 Boulevard Mall operators released PCE and other chemicals into the soil and groundwater
19 and allege that this release could be contributing to the PCE plume alleged by the Plaintiffs.”
20 Id. at 4.

21 **A. Legal Standard**

22 When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the
23 court must accept as true all material allegations in the complaint as well as all reasonable
24 inferences that may be drawn from such allegations. LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150
25 (9th Cir. 2000). Such allegations must be construed in the light most favorable to the
26 nonmoving party. Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000). In general, the
27 court should only look to the contents of the complaint during its review of a Rule 12(b)(6)
28 motion to dismiss. The Ninth Circuit, however, has expanded the court’s view to allow it to

1 consider documents attached to the complaint, documents incorporated by reference in the
 2 complaint, or matters of judicial notice without converting the motion into a motion for summary
 3 judgment. See Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

4 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a
 5 claim is to test the legal sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th
 6 Cir. 2001). The court should exercise caution, however, and presume against dismissing an
 7 action for failure to state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th
 8 Cir. 1997). To avoid a Rule 12(b)(6) dismissal, then, a complaint does not need detailed
 9 factual allegations; rather, it must plead “enough facts to state a claim to relief that is plausible
 10 on its face.” Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008)(quoting
 11 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1974 (2007); Ashcroft v. Iqbal,
 12 ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009)(stating that “a claim has facial plausibility when
 13 the plaintiff pleads factual content that allows the court to draw the reasonable inference that
 14 the defendant is liable for the misconduct alleged”). Even though “detailed factual allegations”
 15 are not required for a complaint to pass muster under 12(b)(6) consideration, the factual
 16 allegations “must be enough to raise a right to relief above the speculative level, on the
 17 assumption that all the allegations in the complaint are true (even if doubtful in fact).”
 18 Twombly, 550 U.S. at 555. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic
 19 recitation of the elements of a cause of action will not do.” Iqbal, ___ U.S. ___, 129 S.Ct.
 20 1937, 1949. “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further
 21 factual enhancement.’” Id. (quoting Twombly, 550 U.S. at 557, 127 S.Ct. 1955).

22 **B. Allegations Asserted in the Third Party Complaint**

23 The Maryland Square Defendants’ Third Party Complaint alleges four causes of action
 24 against Sears: (1) Recovery of Response Costs Pursuant to CERCLA § 107(a)(1-4)(B); (2)
 25 Contribution Pursuant to CERCLA § 113(f); (3) Equitable Indemnity; and (4) Declaratory
 26 Relief.

27 According to the Third Party Complaint, this “action primarily arises under the
 28 Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42

1 U.S.C. § 9607. In the Third Party Complaint, the Maryland Square Defendants state that they
 2 “believe the Third Party Defendants are wholly or partially responsible for the PCE or other
 3 chemical contamination that may form the plume alleged to exist beneath the Plaintiffs’
 4 homes.” (Third Party Complaint (#224) at 6). According to the Maryland Square Defendants,
 5 the Boulevard Mall “currently or in the past has had tenants who used PCE or other chemical
 6 contaminants in the performance of their operations.” Id. at 7. “These entities include, but are
 7 not limited to, a Sears Automotive Center, a Good Year Automotive Center, and/or the Ted
 8 Wiens Automotive Center.” Id. at 7. In the Third Party Complaint, the Maryland Square
 9 Defendants collectively refer to these entities as the “Boulevard Mall Operators.” Id. The
 10 allegations in the Third Party Complaint state that throughout the history of the Boulevard
 11 Mall, the Boulevard Mall Operators have used PCE or other hazardous materials in their
 12 operations. Id. “Upon information and belief, the Boulevard Mall Operators have spilled or
 13 otherwise accidentally discharged PCE or other hazardous materials that may have
 14 contributed to the plume alleged by the Plaintiffs.” Id. Finally, the Third Party Complaint
 15 states that the Boulevard Mall Operators “released PCE or other chemical contaminants into
 16 the soil and groundwater,” and that the “release of these contaminants may [contain]
 17 hazardous materials contributing to the PCE plume alleged by the Plaintiffs.”¹ Id.

18 Sears alleges that the foregoing facts are not sufficient to state a claim for relief under
 19 CERCLA. According to Sears, the allegations are merely “hopeful wishes” that fail to satisfy
 20 the pleading standard created in Iqbal. Rather than asserting conduct by Sears which actually
 21 occurred, Sears states that the Third Party Plaintiffs merely state what “may” have occurred
 22 by the Boulevard Mall Operators.

23 **C. First Cause of Action under CERCLA § 107(a)(1-4)(B)**

24 CERCLA, 42 U.S.C. § 9601 et seq., was enacted in 1980 “to provide for liability,
 25 compensation, cleanup, and emergency response for hazardous substances released into the
 26 environment and the cleanup of inactive hazardous waste disposal sites.” Carson Harbor Vill.

27
 28 ¹ As to Sears, the Third Party Complaint also notes that remediation actions occurred at the Sears Automotive Center in 1993 and 2000.

1 v. County of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006)(quoting Comprehensive
2 Environmental Response, Compensation, and Liability Act of 1980, Pub.L.No. 96-510, 94 Stat.
3 2767 (1980)). CERCLA contains a provision, 42 U.S.C. § 9607(a), which allows private
4 parties who incur cleanup costs to recover those costs from “various types of persons who
5 contributed to the dumping of hazardous waste at a site.” Id. (quoting Ascon Props., Inc. v.
6 Mobile Oil Co., 866 F.2d 1149, 1152 (9th Cir. 1989)). To establish a prima facie case under
7 § 9607(a), the plaintiff must show that: (1) the property at issue is a “facility” as defined in 42
8 U.S.C. § 9609(1); (2) a “release” or “threatened release” of a “hazardous substance” has
9 occurred; (3) the “release” or “threatened release” has caused the plaintiff to incur response
10 costs that were “necessary” and “consistent with the national contingency plan;” and (4) the
11 defendant is in one of four classes of persons subject to liability under § 9607(a). Id.

12 In the Third Party Complaint’s first cause of action, the Third Party Plaintiffs state that
13 they “have been and currently remain engaged in conducting studies and other activities
14 designed to develop an appropriate response plan for removal and/or remedial action with
15 regard to the released hazardous substances.” (Third Party Complaint (#224) at 9). They
16 state that they “have incurred and will continue to incur substantial response costs in
17 developing and implementing the appropriate response action under the supervision of the
18 Nevada Department of Environmental Protection and other appropriate government agencies
19 or as approved by the Court.” Id. In addition, the Third Party Plaintiffs state that at all times
20 relevant, there have been releases or threatened releases of hazardous substances from the
21 facilities operated by the Boulevard Mall Operators and that such releases have caused or
22 continue to cause response costs to the Third Party Plaintiffs.

23 Sears argues that the foregoing allegations are not sufficient to state a claim for relief
24 because the Third Party Plaintiffs did not allege the four elements necessary to assert a
25 CERCLA claim under section 9607(a), nor did they allege facts specific to Sears as to those
26 elements. According to Sears, “[t]here is no indication of which tenants allegedly used,
27 spilled, discharged or released which materials or chemicals, when or where this occurred,
28 or what circumstances surrounded these events.” (Motion to Dismiss (#310) at 12). By

1 referring to Sears collectively with other entities, Sears states that the allegations in the Third
2 Party Complaint “make it difficult, if not impossible to tell which conduct is being alleged”
3 against Sears specifically. Id. at 14.

4 In this matter, the Court finds that the first cause of action fails to state a claim for relief
5 because the allegations asserted are speculative in nature. In this regard, there are
6 insufficient factual allegations from which the Court could infer that a release or threatened
7 release from any facility connected to Sears caused the Maryland Square Defendants to incur
8 response costs. All that can be derived, is that the Maryland Square Defendants have
9 incurred response costs relating to the groundwater plume, and that Sears and other collective
10 third party defendants “may” have used and/or spilled solvents and other chemicals at another
11 location. Because the Third Party Complaint uses the terms “may” and “may have,” the
12 allegations are not sufficient to raise the right to relief above the speculative level as required
13 to survive a motion to dismiss.

14 In their Opposition, the Maryland Square Defendants request that prior to dismissal,
15 they be given an opportunity to amend the complaint with a more definite statement. In this
16 regard, because the factual assertions in the complaint as to Sears are not sufficient to state
17 a plausible claim for relief, the Court, rather than dismissing the claim for relief, will provide
18 the Maryland Square Defendants a limited time to file a more definite statement as to the first
19 cause of action. The more definite statement should include not only the elements necessary
20 to bring a cause of action under section 9607(a), but also sufficient factual content to raise the
21 right to relief above the speculative level.

22 **D. Second Cause of Action under CERCLA § 113(f)**

23 Under 42 U.S.C. § 9613 (f)(1) “[a]ny person may seek contribution from any other
24 person who is liable or potentially liable under section 9607(a) of this title, during or following
25 any civil action under section 9609 of this title or under section 9607(a) of this title.” In the
26 Third Party Complaint, the Maryland Square Defendants seek contribution under section
27 113(f)(1) based on Plaintiffs’ RCRA claims against them. (Third Party Complaint (#224) at
28 11). Specifically, the Maryland Square Defendants state that “if the Maryland Square Parties

1 are found to be liable under RCRA, the Third Party Defendants and each of them are liable
2 to the Maryland Square Parties for their acts or omissions.” Id.

3 Sears argues that this claim should be dismissed because the Maryland Square
4 Defendants “do not allege the necessary factual prerequisites for seeking contribution” under
5 section 113(f). (Motion to Dismiss (#310) at 20). In this regard, Sears states that the second
6 cause of action seeks contribution for a claim Plaintiffs made against the Maryland Square
7 Defendants under RCRA. According to Sears, a “RCRA action cannot satisfy the threshold
8 requirement for a 113(f)(1) action” and, as such, the Maryland Square Defendants cannot
9 state a 113(f)(1) contribution claim against Sears.

10 In this matter, Sears is correct that the Maryland Square Defendants improperly base
11 their CERCLA contribution claim on the underlying RCRA claim filed by Plaintiffs. In this
12 regard, 42 U.S.C. 9613(f) states that contribution may be sought “during or following any civil
13 action under section 9606 *of this title* or under section 9607(a) *of this title*.” (Emphasis added).
14 As such, the civil action must have been brought under CERCLA; it does not relate to claims
15 brought under RCRA. However, the Court notes that the Maryland Square Defendants have
16 now been sued under CERCLA by NDEP. Thus, rather than dismissing this claim for
17 improperly seeking contribution under a RCRA cause of action, the Court will allow the
18 Maryland Square Defendants leave to amend their Third Party Complaint to state a proper
19 contribution claim.

20 **E. Third Cause of Action for Equitable Indemnity**

21 The Maryland Square Defendants assert a cause of action against Sears for equitable
22 indemnity. According to the Maryland Square Defendants: “In the event liability should be
23 established in this action . . . based on the contamination alleged by the Plaintiffs, whose
24 liability is expressly denied, the Maryland Square Parties allege on information and belief that
25 such liability was realized wholly or in part by reason of the conduct of the Third Party
26 Defendants” (Third Party Complaint (#224) at 12).

27 Under Nevada law, “[n]oncontractual or implied indemnity is an equitable remedy that
28 allows a defendant to seek recovery from other potential tortfeasors whose negligence

1 primarily caused the injured party's harm." Rodriguez v. Primadonna Co., LLC, 216 P.3d 793,
2 801 (Nev. 2009). "At the heart of the doctrine is the premise that the person seeking to assert
3 implied indemnity - the indemnitee - has been required to pay damages caused by a third
4 party - the indemnitor." Id. (quoting Harvest Capital v. W.Va. Dept. of Energy, 560 S.E.2d 509,
5 513 (2002)). "Implied indemnity has been developed by the courts to address the unfairness
6 which results when one party, who has committed no independent wrong, is held liable for the
7 loss of a plaintiff caused by another party." Id.

8 Generally, in Nevada, the remedy of equitable indemnity is available after the
9 defendant has extinguished its own liability through settlement or by paying a judgment. Id.
10 The Nevada Supreme Court holds that "a cause of action for indemnity . . . accrues when
11 payment has been made." Id. (quoting Aetna Cas. & Sur. v. Aztec Plumbing, 106 Nev. 474,
12 476, 796 P.2d 227, 229 (1990)). A claimant seeking equitable indemnity must plead and
13 prove that: (1) it has discharged a legal obligation owed to a third party; (2) the party from
14 whom it seeks liability also was liable to the third party; and (3) as between the claimant and
15 the party from whom it seeks indemnity, the obligation ought to be discharged by the latter.
16 Id.

17 In this matter, the Maryland Square Defendants' cause of action for equitable
18 indemnity, although sparse, appears to state a claim for relief against Sears. In their
19 complaint, the Maryland Square Defendants have made general allegations against the
20 "Boulevard Mall Operators," alleging that those entities are responsible for "the PCE or other
21 chemical contamination that may form the plume" under Plaintiffs' residences. Although Sears
22 is identified with several other entities as the "Boulevard Mall Operators," the factual
23 assertions against those entities are sufficient to state a claim that is plausible on its face as
24 to Sears.

25 However, in addition to the foregoing, Sears also argues that the Maryland Square
26 Defendants' claim for equitable indemnity must be dismissed because the Maryland Square
27 Defendants have not asserted any pre-existing relationship between them and Sears, which
28 Sears states is required to assert a claim for equitable indemnity under Nevada law. (Motion

1 to Dismiss (#310) at 24). In response, the Maryland Square Defendants state that they are
2 not required to plead a nexus or special relationship between them and Sears to be entitled
3 to equitable indemnity. (Opposition to Motion to Dismiss (#318) at 8). Rather, the Maryland
4 Square Defendants state that this requirement is only necessary when seeking a recovery of
5 attorney's fees.

6 In Reid v. Royal Ins. Co., the Nevada Supreme Court discussed a cause of action for
7 equitable indemnity. 80 Nev. 137, 141, 390 P.2d 45 (Nev. 1964). In that case, the court noted
8 that: "A defendant is permitted to defend the case and at the same time assert his right of
9 indemnity against the party ultimately responsible for the damage." Id. "The application of
10 indemnity (when proper) shifts the burden of the entire loss from the defendant tort-feasor to
11 another who should bear it instead." Id. (citing Prosser, Torts §46 (2nd Ed.)). As a general
12 proposition, the court held that "the third-party practice device is *not* available in a case
13 involving joint or concurrent tort-feasors having no legal relation to one another, and each
14 owing a duty of care to the injured party." Id. (quoting State ex re. Siegel v. McLaughlin, 315
15 S.W.2d 499, 507 (Mo. Ct. App. 1958). In such a case, "the plaintiff has the right to decide for
16 himself whom he shall sue." Id. The court stated that third-party indemnity practice "shall not
17 be used by a defendant for the purposes of offering another defendant to the plaintiff." Id.

18 In Scaffidi v. United Nissan, the court dismissed an equitable indemnity claim because
19 there was not a preexisting relationship between the party seeking indemnity and the alleged
20 secondary tortfeasor. 425 F.Supp. 2d 1159, 1171 (D.Nev. 2005). In Scaffidi, the court cited
21 the rule established in Reid and held that Nevada law requires "a preexisting legal relation .
22 . . or some duty on the party of the primary tortfeasor to protect the secondary tortfeasor" in
23 order for equitable indemnity to apply. Id.; see also The Doctors Co. v. Vincent, 120 Nev. 644,
24 688, 98 P.3d 681 (Nev. 2004)(stating that "in order for one tortfeasor to be in a position of
25 secondary responsibility vis-a-vis another tortfeasor, and thus be entitled to indemnification,
26 there must be a preexisting legal relation between them, or some duty on the party of the
27 primary tortfeasor to protect the secondary tortfeasor").

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In light of the foregoing case law, the Court finds that the Maryland Square Defendants have failed to state a claim for equitable indemnity against Sears because the Maryland Square Defendants have not asserted the existence of any preexisting relationship or duty between the parties as required by Nevada law. Nevada law provides that a special relationship must exist between an indemnitor and indemnitee in order for that cause of action to apply. By failing to allege the existence of such a relationship, the Maryland Square Defendants have failed to state a claim for relief for equitable indemnity.

IV. Motion to Consolidate

Also before the Court is the Shapiro Defendants' Motion to Consolidate Case No. 3:09-cv-231 with Case No. 2:08-cv-1618. (3:09-cv-231 Def.'s Mot. to Consolidate (#46); 2:08-cv-1618 Def.'s Mot. to Consolidate (#335)). On June 24, 2010, the Maryland Square Defendants joined the motion to consolidate. (2:08-cv-1618 Def.'s Joinder (#357)). The State of Nevada has also indicated that it does not object to consolidation. (Oberman Decl. ¶ 6, attached to 3:09-cv-231 Def.'s Mot. to Consolidate (#46)). The Individual Plaintiffs, however, oppose the motion to consolidate. (2:08-cv-1618 Pl.'s Opp'n (#346)).

"If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions" Fed. R. Civ. P. 42(a). The purpose of consolidation is to avoid unnecessary cost and delay. See id.; E.E.O.C. v. HBE Corp., 135 F.3d 543, 550 (8th Cir. 1998) (discussing prior, but substantially identical version of Rule 42). It is appropriate to consolidate cases to "avoid the inefficiency of separate trials involving related parties, witnesses, and evidence." HBE Corp., 135 F.3d at 551. "The district court may order consolidation despite the opposition of the parties." St. Bernard Gen. Hosp. v. Hosp. Serv. Ass'n of New Orleans, 712 F.2d 978, 989 (5th Cir. 1983). "The fact that a defendant may be involved in one case and not the other is not sufficient to avoid consolidation." Id. "Consolidation is inappropriate, however, if it leads to inefficiency, inconvenience, or unfair prejudice to a party." Id. A court abuses its discretion if it consolidates two claims against the same defendant that involve unrelated legal and factual issues. Enter. Bank v. Seattele, 21 F.3d 233, 236 (8th Cir. 1994). "Consolidation of issues and claims is committed to the

1 discretion of the trial court.” HBE Corp., 135 F.3d at 551. “The burden is on the movant to
2 convince the court that there should be consolidation.” Transeastern Shipping Corp. v. India
3 Supply Mission, 53 F.R.D. 204, 206 (S.D.N.Y. 1971).

4 “Consolidation may properly be denied in instances where the cases are at different
5 stages of preparedness for trial.” Mills v. Beech Aircraft Corp., Inc., 886 F.2d 758, 762 (5th
6 Cir. 1989); St. Bernard, 712 F.2d at 990 (holding that district court may deny consolidation
7 when one case is ready for trial and the others are still in discovery); Transeastern Shipping,
8 53 F.R.D. at 205–06 (denying motion to consolidate because, though the cases presented
9 common questions, some were ready for trial, some were in pretrial, and some had not yet
10 entered pretrial). In Mills, the plaintiffs moved to consolidate with a case arising from the
11 same airplane crash. Id. at 761. The other case was filed more than two years after the
12 plaintiffs’ case. Id. at 762. The plaintiffs had already entered a final pretrial order. Id. The
13 district court denied the plaintiffs’ motion to consolidate, noting that the litigant in the other
14 case did not wish to be limited to plaintiffs’ discovery and bound by plaintiffs’ pretrial order.
15 Id. The appellate court affirmed. Id.

16 In this matter, the parties do not contend that these two cases lack common questions
17 of law and fact. Instead, they dispute whether or not the advantages to judicial economy and
18 convenience of a single trial outweigh the potential prejudice due to delay to the Individual
19 Plaintiffs. The Individual Plaintiffs essentially argue that consolidation will result in prejudicial
20 delay because the two cases are at different stages in preparedness for trial and because they
21 may soon succeed on their motion for summary judgment. (2:08-cv-1618 Pl.’s Opp’n (#346)
22 2:18–25). They argue that their case is ready for summary judgment and trial while the State
23 of Nevada’s case is still in the process of finalizing the pleadings and serving summons. (Id.
24 at 7:4–13). The Individual Plaintiffs also argue that the State of Nevada’s case is more
25 complex than their case because the State’s case involves issues determining causation,
26 proper remediation, and appropriate costs. (Id. at 7:14–19). The Individual Plaintiffs finally
27 argue that they will be burdened if they have to wait through a six to eight-week trial to
28 determine which of the defendants should pay for the clean up while their case is summary

1 in nature. (Id. at 7:19–25). The Shapiro Defendants argue that the convenience of resolving
2 all issues with one trial outweighs the Individual Plaintiffs' concerns. (3:09-cv-231 Def.'s
3 Reply (#64) 6:15–28).

4 Given that the Individual Plaintiffs were not able to bifurcate their case from the third-
5 party claims, these two cases are in very similar stages of trial preparedness. Furthermore,
6 both are still in discovery and neither has filed a pretrial order. In fact, both may still amend
7 pleadings. If the cases are consolidated, the Individual Plaintiffs' may still succeed on their
8 motion for summary judgment and suffer no delay in receiving injunctive relief. Therefore, the
9 Court grants the motions to consolidate.

10 CONCLUSION

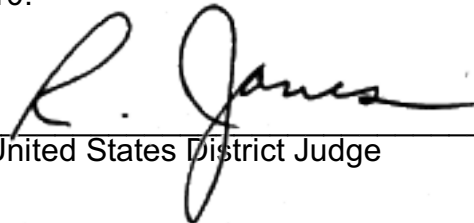
11 For the foregoing reasons, it is ORDERED that the Motion of Defendant Melvin Shapiro
12 for Leave to File a Third Party Complaint (#249) is GRANTED.

13 IT IS FURTHER ORDERED that General Growth Management, Inc. and Boulevard
14 Mall, LLC's Motion for More Definite Statement (#292) is GRANTED.

15 IT IS FURTHER ORDERED that Sears Roebuck & Company's Motion to Dismiss
16 (#310) is GRANTED IN PART and DENIED IN PART. The claim for equitable indemnity
17 against Sears is dismissed. The remaining claims for relief are not dismissed, but the
18 Maryland Square Defendants are to amend those claims consistent with this Order.

19 IT IS FURTHER ORDERED that the Motion to Consolidate (#335) in Case No. 2:08-cv-
20 1618 and Motion to Consolidate (#6) in Case No. 3:09-cv-231 are GRANTED.

21 DATED: This 22nd day of July, 2010.

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23 
24 United States District Judge
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